distinct from the purchase and sale of whisky in *Commissioners of Inland Revenue* v. *Fraser, supra.* Be that as it may, the Special Commissioners found all of the conditions present in this case. On my part, if I do not entirely agree with them, I think at least two of the conditions were present, viz. activities which led to the maturing of the asset to be sold and the fact that the nature of the asset should lend itself to commercial transactions. On the first point, the appellant's activities in paying compensation to get rid of the occupants of the four houses on the land, his request for valuation and his successful application for conversion for building purposes are sufficient activities to lead to the maturing of the asset to be sold, although he did nothing on his own to improve the land. Secondly, the nature of the land itself being near the town and surrounded by a newly developed housing area should lend itself to commercial transactions even without conversion for otherwise the appellant would not have stuck to his bargain to the extent of taking legal proceedings which ended in him paying a larger sum to the vendor to own the land himself in spite of the conditions for its improvement not having been fulfilled.

In the circumstances I cannot regard the transaction as an investment and/or the profit from the sale to amount to a capital appreciation. It seems to me that the only conclusion on the facts as found by the Special Commissioners is that the appellant acquired the land with the expectation and intention of selling it at a profit and that was an adventure in the nature of trade.

With regard to the action of the appellant in transferring the shares of Chai Hup & Company to his wife and children and he becoming a director of the company without any shareholding, I do not consider that the case of *Williams* v. *Davies*[15] is in point. There is a subtle distinction as in that case the husband through a well-planned scheme made a gift of the lands purchased to his wife who in turn sold them at a profit. The wife was held to be the beneficial owner of the properties in question and did not hold them as nominee or trustee for her husband. In the present case the appellant having purchased and sold the land at a profit in his name transferred the profit in the form of shares to his wife and children. To my mind, if it was a scheme to avoid assessment of income tax, it was not so well-planned as the case stated above.

In the result, I would dismiss the appeal with costs and confirm the decision of the Special Commissioners.

Appeal dismissed.

Solicitors: *Lim Ewe Hock.*

RE TAN BOON LIAT @ ALLEN & ANOR.; TAN BOON LIAT & ANOR. v. MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.

[O.Cr.J. (Arulanandom J.) August 26, 1976]

[Penang — Miscellaneous Criminal Applications Nos. 13 and 14 of 1976]

Administrative Law — Habeas Corpus — Persons detained under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 — Written representations against orders of detention made — Recommendations to Yang di-Pertuan Agong not made within three months — Whether detention illegal — Emergency (Public Order and Prevention of Crime) Ordinance, 1969, s. 6 — Criminal Procedure Code (F.M.S. Cap. 6), s. 365 — Federal Constitution, art. 151(1)(b).

In this case the applicants had been detained under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. They made written representations against their orders of detentions and inquiries were held but the Advisory Board did not make their recommendations within three months of the detention of the applicants. At the time of the applications, however the Advisory Board had made their recommendations to the Board, though after the three months. It was argued that the continued detention of the applicants after a lapse of three months from the date of the original order of detention became illegal and unlawful if within the three months the Advisory Board had not met to consider the representations made by the applicants and following on that made representations to the Yang di-Pertuan Agong.

Held: while the procedural requirements had not been complied with in this case, valid orders of detention were in force against the two applicants and their detention was therefore legal.

Cases referred to:-

(1) *Dharma Singh* v. *State of Punjab* A.I.R. 1958 S.C. p. 152.

(2) *Abdul Karim & Ors.* v. *State of West Bengal* A.I.R. 1969 S.C. p. 1028.

(3) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129, 148.

(4) *State of Bombay* v. *Atma Ram* A.I.R. 1951 S.C. 157.

(5) *Ooi Ah Phua* v. *Officer-in-charge, Criminal Investigations, Kedah/Perlis* [1957] 2 M.L.J. 198.

CRIMINAL APPLICATION.

Karpal Singh (*K. Kumaraendran* and *K. Balasundaram* with him) for the applicants.

Zaki bin Azmi (Deputy Public Prosecutor) for the respondents.

Arulanandom J.: These are two applications by detenus for writs of *habeas corpus* directed to (1) the Menteri Hal Ehwal Dalam Negeri, Malaysia; (2) Ketua Polis Negara, Malaysia, and (3) Penguasa Kanan Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang, to have them brought before this Honourable Court together with the day and cause of their being taken and detained to undergo and receive all and singular such matters and things as this Honourable Court shall then and there consider or concerning them in this behalf upon the grounds set forth in their affidavits. Although there is a slight difference in the facts of the two cases the issues involved are identical and at the outset it was agreed by counsel that the court would deal with both these cases together.

The facts in the case of Tan Boon Liat @ Allen is that he was detained for a period of two years under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, at Pulau Jerejak by an order of detention under the hand of

the Menteri Hal Ehwal Dalam Negeri, Malaysia, dated January 26, 1976.

He made written representations against the said order of detention. An enquiry was held on March 19, 1976, before the Advisory Board. His counsel appeared for him at the said enquiry and made representations on his behalf against the said order of detention.

In the affidavit supporting his application it is stated that no recommendations were made by the Advisory Board pertaining to his representations to His Majesty the Yang Dipertuan Agung and in view of that he considers that his continued detention is not in accordance with the laws and also unconstitutional in that it is in contravention of the provisions of Article 151(1)(b) of the Federal Constitution. However in the Affidavit-in-Reply the Secretary to the Advisory Board established in pursuance of Article 151 paragraph 1 sub-paragraph (b) of the Constitution and section 5 of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, states that recommendations by the Advisory Board on behalf of the detenu were made to the Yang Dipertuan Agung on May 11, 1976.

As far as the facts are concerned there is now no dispute.

As regards Chan Han Mow @ Han Mau @ Sunny Chua, the second detenu, it is stated that he was detained for a period of two years under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, at the Pulau Jerejak Rehabilitation Centre by an order of detention under the hand of the Menteri Hal Ehwal Dalam Negeri, Malaysia, dated September 11, 1975. He further states that he had made many representations against the said order of detention and he appeared in person before the Advisory Board which held an enquiry to consider the representations against the said order of detention.

He further states that no recommendations had been made by the Advisory Board pertaining to his representations to His Majesty the Yang Dipertuan Agung and in view of that he held that his continued detention was not in accordance with the law and was also unconstitutional and was in contravention of Article 151(1)(b) of the Federal Constitution. However, in reply, the Secretary to the Advisory Board established in pursuance of Article 151(1)(b) of the Constitution and section 5 of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, states that the recommendations to the Yang Dipertuan Agung were made on March 22, 1976, and that detention had been confirmed by the Yang Dipertuan Agung. According to him, the enquiry which was held to consider the detenu's representations was held between February 19 and February 21, 1976. As in the first case, the facts are not in dispute.

Both detenus claimed to be Malaysian citizens.

The detenus' claim that while the original order of detention against them could have been legal, the fact that section 6 of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, has not been complied with and that Article 151(1)(b) of the Constitution has been infringed makes their continued detention illegal and unlawful. Section 6 of the said Ordinance reads as follows: —

"6. (1) Whenever any person has made any representations under section 5(1) to an Advisory Board, the Advisory Board, shall within three months of the date on which such person was detained, consider such representations and make recommendations thereon to the Yang di-Pertuan Agong.

(2) Upon considering the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to the provisions of section 7, be final, and shall not be called into question in any Court."

and Article 151(1)(b) of the Constitution reads as follows: —

"151. (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —

(b) no citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong."

Counsel for detenus submits that continued detention after a lapse of three months from the date of the original order becomes illegal and unlawful if within the three months the Advisory Board had not met to consider the representations made by the detenus and following on that made representations to the Yang Dipertuan Agung about their detention. Counsel submits that this is a constitutional right of the applicants and if there is any infringement then the detention is wholly illegal as it also violates Article 5(1) of the Constitution which says no person shall be deprived of his life or personal liberty save in accordance with law.

On the facts it cannot be disputed that there has been violation of the provisions of the sections of the law relied on by the counsel. To fortify the arguments counsel relied on the case of *Dharma Singh* v. *State of Punjab*.[1] In that case the petitioner was also detained under the Preventive Detention Act, 1950, of India. Under section 10 of the Preventive Detention Act of India the Advisory Board is enjoined after going through the procedure therein laid down to make its report to the State Government within ten weeks from the date of detention. On the report being made, the State Government has to take steps under section 11 of the Act. If the report is against the detention the Government has no option but to release the detenu forthwith. On the other hand, if the report approves of the detention, the Government may, but is not bound to, continue the detention, and, if it does decide to continue the detention, it has to fix the period of such detention. In that case the Advisory Board had not made its recommendations within ten weeks of the detention. The court held that the making of the report within the time prescribed by law was of the utmost importance to the detenu and the failure to make the report in time could quite conceivably have the effect of unlawfully prolonging the detention and therefore after the expiry of ten weeks the detenu may well complain that he has been deprived of his personal liberty otherwise than in

accordance with the procedure established by law. The court therefore directed the writ of *habeas corpus* to be issued and the petitioner set at liberty forthwith.

Counsel also relied on another case, of *Abdul Karim & Ors.* v. *State of West Bengal.*[2] Here the detenu alleged that the procedural provision of Article 22 of the Indian Constitution had not been complied with as far as his detention was concerned and therefore his continued detention was illegal. Article 22 prescribes the minimum procedure that must be included in any law permitting preventive detention and if such requirements are not observed the detention infringes the fundamental right of the detenu guaranteed under Articles 21 and 22 of the Constitution. The said requirements are: (1) that no law can provide for detention for a period of more than three months unless the sufficiency for the cause of the detention is investigated by an Advisory Board within the said period of three months; (2) that the State Law cannot authorise detention beyond the maximum period prescribed by Parliament under the powers given to it in Article 22, Clause (7); (3) that Parliament also cannot make a law authorising detention for a period beyond three months without the intervention of an Advisory Board unless the law conforms to the conditions laid down in Clause (7) of Article 22. Apart from these conditions, there are other procedural rights that have been expressly safeguarded by Clause (5) of Article 22 but for the purposes of our case it is not necessary to go into them in detail. As some of the procedural requirements of the Constitution had not been complied with the court held that the continued detention became illegal. The final paragraph of the head-note in that case reads as follows: —

"A predominant position and role is given in our constitution to human personality and human freedom as the ultimate source of all moral and spiritual values. Preventive detention is a serious invasion of personal liberty, and, therefore, the Constitution has provided procedural safeguards against the improper exercise of the power of preventive detention. All the procedural requirements of article 22 are mandatory in character and even if one of the procedural requirements is not complied with, the order of detention would be rendered illegal."

There is no denying that in the two cases before me the procedural requirements have not been complied with, and, if the matter were to end there, I would not have the slightest hesitation in ordering the applicants to be set at liberty but the decisions of our courts in considering matters of this nature constrain me to consider the question of the detention becoming illegal through acts not being performed within the time-limit prescribed by both section 6 of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, and Article 151(1)(b) of the Constitution in the light of our decided cases. The full court of five judges which sat in 1969 to consider the question of detention under the Internal Security Act where Article 5 of our Constitution was invoked did consider the question of procedural requirements not having been complied with in the case of *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia.*[3] In this case the court made a distinction between 'law' and procedure. Suffian F.J. (as he then was) in the course of his judgment referred to Article 21 of the Indian Constitution and he says: —

"The second reason for the strict attitude taken by the Indian Supreme Court is probably this, that in India article 21 of the Constitution provides that 'no person shall be deprived of his life or personal liberty except according to procedure established by law.'

In the *State of Bombay* v. *Atma Ram*[4] Kania C.J., referred in paragraph 16 on page 165 of his judgment to the 'procedural rights of the detenu' mentioned in article 22(5). Sastri J. in his judgment at page 166 said this: —

'If this *procedure* (prescribed by clauses (5) and (6) of article 22) is not complied with, detention under the Act (Preventive Detention Act, 1950) may well be held to be unlawful, as it would then be deprivation of personal liberty which is not in accordance with the *procedure* established by law.'

In contrast, clause (1) of article 5 of our Constitution make no mention of the word 'procedure' and provides simply as follows: —

'No person shall be deprived of his life or personal liberty save in accordance with law.' "

Then further on Suffian F.J. goes on to say: —

"Our law is quite different from that of India. First, as already stated, the power of detention is here given to the highest authority in the land, acting on the advice of Minister responsible to and accountable in Parliament, not to mere officials. Secondly, as already stated, here detention, in order to be lawful, must be in accordance with law, not as in India where it must be in accordance with *procedure* established by law. I have italicised the word 'procedure' twice in the extract from Sastri J.'s minority judgment in *Atma Ram* above, to show the importance attached to procedure under Indian law."

Considering the present complaint by the detenus in the light of the above decision by which I am bound, I have to concede that if one separates fundamental law from procedure in both section 6 of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, and Article 151(1)(2), one would have to admit that the requirements that the Advisory Board must meet within a period of three months and make its recommendations within a period of three months are only procedural. The acts which are required by law to be done had been done *albeit* they were done outside the time-limit prescribed by law. Furthermore, counsel for respondents urges that in considering writs of *habeas corpus* the court must only consider whether at this stage the detention is legal or illegal. In other words, counsel submits that once the detention is validated by a proper order although it may be outside the time limited in the various legal provisions, the detention is legal. In the case of *Ooi Ah Phua* v. *Officer-in-Charge, Criminal Investigations, Kedah/Perlis,*[5] the subject had been arrested by the police on December 26, 1974, and he was produced before the magistrate who issued an order under section 117 to authorise the detention of the accused in custody for a week until January 3, 1975. Subsequently, in the appeal against the judge's decision dismissing an application for a writ of *habeas corpus*, the Lord President, Suffian L.P., had this to say: —

"This being an application under section 365 of the Criminal Procedure Code and under article 5(2) of the Constitution, with respect I agree with Encik Lamin for the respondent that the real issue is a simple one, namely this, whether or not Ooi was lawfully detained. If so, the court should not release him; if not, the court should release him. As to this the affidavit evidence is very clear. There was an armed robbery, a seizable offence, and there was a reasonable suspicion that Ooi was concerned in that offence, and Inspector Amiruddin not only had power to arrest him without a warrant (section 23(1)(a) of the Criminal Procedure Code), he was also under a duty to do so. By the time this application

was filed on January 5, 1975, Ooi had been detained by order of a magistrate, and so there was no question of his detention being unlawful."

Applications for writs of *habeas corpus* are made under section 365 of our Criminal Procedure Code which reads as follows: —

"365. The High Court may whenever it thinks fit direct —

(i) that any person who
  (a) is detained in any prison within the limits of the Federation on a warrant of extradition whether under the Extradition Ordinance, 1958, or the Commonwealth Fugitive Criminals Act, 1967; or
  (b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation,
  be set at liberty;
(ii) that any defendant in custody under a writ of attachment be brought before the court to be dealt with according to law."

The operative words in sub-section (b) are "is alleged to be illegally or improperly detained". This only buttresses the decision in the previous cases as what is relevant is whether the detention of applicants is legal or illegal at the time the applications came before the court.

From the facts adduced before the court it is quite clear that while there were procedural defects along the line at this stage, valid orders of detention are in force against the two applicants, and, therefore, their detention is legal.

In analysing the judgment of the full court in *Karam Singh* one distinction between the rationale of the judges of the Federal Court and the judges of the Indian Courts is projected into bold relief. The judges of the Federal Court are pragmatic and realistic and do not have their visions blurred or obscured by theoretical clouds.

Hence on the principles inspiring the judgment one can distil what the substantive rights of a person detained under Sections 4, 5 and 6 of the Emergency Ordinance are. They are:—

(1) To be informed of the grounds of his detention;
(2) Subject to Clause (3) of Article 151 of the Constitution (which provides that no authority may be required to disclose facts whose disclosure would in its opinion be against the national interest) to be informed of the allegations of fact on which the order is based;
(3) To be served with a copy of the detention order as soon as may be after the making of the order;
(4) To be informed of his right to make representations to an Advisory Board;
(5) To be furnished with a statement in writing —
  (i) of the grounds on which the order is made;
  (ii) of the allegations of fact on which the order is based.
(6) To make representations to an Advisory Board;
(7) To have his representations heard and considered by the Advisory Board;
(8) To have the Advisory Board make recommendations to the Yang Dipertuan Agung.

If these rights have been accorded to the detenu and subsequent to this on the directions of the Yang Dipertuan Agung the detention order is confirmed and ratified then the detention of the detenu is legal and no mischief has been done to the section 6 of the Emergency Ordinance 5 of 1969 or Article 151 of the Constitution.

For the courts, just because the Advisory Board through want of time or other eventualities was unable to hold its inquiry or make its recommendations within the prescribed period of three months or just because the manner or form in which other technical requisites were complied with was not in the prescribed forms, to hold that the personal liberty of a person lawfully detained has been invaded with such violence as to entitle him to be set free when the detenu by his involvement in international drug trafficking has sentenced to imprisonment for life the minds and bodies of young men and women throughout the world by enslaving them to drugs would be to reduce the courts to forums for theatrical farce and judges to the level of arbiters imperceptive to the urgency for the administration of justice to develop with a changing society.

The applications are therefore dismissed.

Application dismissed.

Solicitors: *Karpal Singh & Co.; Kumar, Chan & Chia; Balasundram & Co.*